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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA EUGENE LONG,

Defendant and Appellant.

C085969

(Super. Ct. No. 16FE007400)

Defendant Joshua Eugene Long appeals his conviction for robbery (Pen. Code, § 211).¹ He contends the trial court erred in failing to instruct the jury on unanimity, arguing that the jurors' questions and failure to reach a verdict on the gun enhancement signal their disagreement as to the conduct underlying the "force or fear" element. As we explain, where, as here, there was evidence of only one discreet crime--no matter how it

¹ Undesignated statutory references are to the Penal Code.

was committed--instruction on unanimity is not required. Accordingly, we affirm the judgment.

As we explain, *post*, based on intervening events, we shall remand the matter to the trial court for the limited purpose of permitting the exercise of discretion whether to dismiss the five-year enhancement previously mandated by section 667, subdivision (a).

BACKGROUND

At trial, victim Jacob R. testified that he contacted defendant to buy a car and they agreed on a price of \$500. Defendant brought the car to Jacob and drove them back toward his apartment. During the ride, Jacob gave defendant \$500 for the car. After Jacob had paid, defendant pulled into a parking lot and stopped the car. He drew a handgun from the pocket of the driver's door, cocked it, pointed it at Jacob's head and told him to "[g]et the eff out of my car." Jacob got out and defendant told him that if he called the police, he and his son were dead. Jacob ran back to his apartment and called 911.

Officer Michael Dyson responded to Jacob's call. Dyson noted Jacob was visibly upset and seemed scared. Jacob reported that when defendant pulled the gun, he said, "I'm sorry I have to do this but get the fuck out of my car and give me your money." He also reported the threat to kill him and his son.

Defendant testified to the planned sale of the car, but said that Jacob did not have the amount of money on which the two had agreed and had propositioned him by touching his crotch and offering to "do whatever it takes to get the car." Defendant was upset; he pulled into the parking lot, yanked his car door open, and said, "What the fuck," as he started to get out of the car. He was thinking about "beating [Jacob's] ass." Jacob got out of the car and said he did not want any problems. Defendant sat back down and drove away. He was not thinking about the money Jacob had already given him, which was still in the car. When he realized he still had it, he decided not to return it.

PROCEDURAL HISTORY

An amended information charged defendant with robbery (§ 211) and a personal use of a firearm enhancement (§ 12022.53, subd. (b)). The information also alleged defendant had sustained three prior strike convictions (§§ 667, subds. (a), (e)(2), 1170.12, subd. (c)(2)) and had served two prior prison terms (§ 667.5, subd. (b)).

During the jury instruction conference, defense counsel referenced the perceived need for an instruction on unanimity. She argued there had been two versions of events described in the testimony: in one, defendant pulled a gun on Jacob; in the other, defendant angrily started out of the car toward Jacob. Counsel posited that the jurors needed to “agree on . . . what constitutes the robbery.” The trial court stated in part, “if they believe he took money by force and fear, it could have been him pulling a gun; it could have been him saying if you talk, I’ll kill you; it could have been just looking mean. I don’t think that would require unanimity instructions.” Counsel argued because there were multiple factual scenarios that could prove the element of force or fear, a unanimity instruction was necessary. The court responded in part that it did not “think a jury would be required to [agree] to everything that was said. They have to decide was money taken by force or fear.”

The jury found defendant guilty of robbery but failed to reach a verdict on the firearm use allegation. In bifurcated proceedings, the trial court found the prior conviction allegations true. The court sentenced defendant to prison for seven years plus 25 years to life.

DISCUSSION

I

Unanimity Instruction

Defendant contends the trial court prejudicially erred in failing to instruct the jury on unanimity. He contends the jury heard evidence of two distinct scenarios, and either scenario could have satisfied the force or fear element. He contends the jury should have been told that its members needed to unanimously agree as to the act proving that element, and the jury's questions regarding force or fear² and its failure to reach a verdict on the gun enhancement show that it "struggled."

A defendant in a criminal trial has a constitutional right to a unanimous jury verdict. (Cal. Const., art. I, § 16.) Where the evidence shows more than one offense occurred, the jury must agree on the particular act committed in order to convict on the charged offense. (*People v. Madden* (1981) 116 Cal.App.3d 212, 219.) Thus "[a] unanimity instruction is required if there is evidence that more than one crime occurred, each of which could provide the basis for conviction under a single count. (*People v. Diedrich* (1982) 31 Cal.3d 263, 281 [when evidence suggested more than one act of bribery, jury must agree unanimously which act was the basis for conviction]; see *People v. Beardslee* (1991) 53 Cal.3d 68, 92 ['A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses'].)" (*People v. Grimes* (2016) 1 Cal.5th 698, 727.)

² The jury asked the court to clarify "what constitutes 'fear' "; asked for readback of defendant's as well as the victim's testimony regarding their time together in the car after it pulled over (i.e. the time during which the force or fear was displayed); and asked what would happen if they could not reach a unanimous verdict as to the "additional charge of count 1."

This case is different. Here, only one discreet criminal act was alleged--that defendant robbed the victim of the money he paid for the car, depriving him of that money by force or fear. Whether defendant used the gun to accomplish the robbery or did so by intimidation alone was of no moment to the jury's decision on the robbery count. Where "the evidence suggests that a defendant committed only one discrete criminal event—but may have done so in one of several different ways—no unanimity instruction is required. ([*People v. Russo*] (2001)] 25 Cal.4th [1124,] 1135; *People v. Millwee* (1998) 18 Cal.4th 96, 160 [.] Unanimity is not required in this situation even if the jurors might conclude that the defendant is guilty based on different facts, or on different findings about the acts the defendant committed or his mental state. ([*People v. Jenkins*] 2000)] 22 Cal.4th [900] 1025-1026; *People v. Pride* (1992) 3 Cal.4th 195, 249-250 []; *People v. Davis* (1992) 8 Cal.App.4th 28, 45.) That is because, in this situation, the jury's guilty verdict will still reflect unanimous agreement that the defendant committed a single crime." (*People v. Quiroz* (2013) 215 Cal.App.4th 65, 73-74.)

“ ‘[D]ifferent jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.’ ” (*Schad v. Arizona* (1991) 501 U.S. 624, 631-632.)

Accordingly, “a unanimity instruction is not required as to which overt act was committed in furtherance of a conspiracy (*People v. Russo, supra*, 25 Cal.4th at pp. 1135-1136); which felony the defendant intended to commit when burglarizing a house (*People v. Failla* (1966) 64 Cal.2d 560, 567-569); which acts constitute lying in wait for a murder conviction (*People v. Edwards* (1991) 54 Cal.3d 787, 824); or which aggravating factors render the defendant eligible for the death penalty (*People v. Cook* (2006) 39 Cal.4th 566, 618-619).” (*People v. Quiroz, supra*, 215 Cal.App.4th at p. 74.)

“The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a ‘particular crime’ (*People v. Diedrich, supra*, 31 Cal.3d at p. 281); it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly how the crime was committed is not required. . . . In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction.” (*People v. Russo, supra*, 25 Cal.4th at pp. 1134-1135.)

Here, the discrete criminal offense of robbery, one count, was supported by evidence of multiple acts of force and fear. It was up to individual jurors to weigh the conflicting evidence and assign credibility thereto, and up to the jury as a whole to deliberate and decide if the evidence proved the discrete charged offense, including the element of force or fear. The determinations of “if” and “how” the crime was committed were left to the jury. So long as the jury unanimously agreed that the answer to the first question was “yes,” the individual jurors did not need to unanimously agree on the answer to the second question. Thus, defendant was not entitled to instruction on unanimity.

II

Senate Bill No. 1393

After waiving oral argument, defendant requested leave to file a supplemental brief concerning the impact of Senate Bill No. 1393 to his case. Defendant contends his case must be remanded to the trial court to exercise its discretion whether to strike the five-year prior enhancement (§ 667, subd. (a)) as now permitted by Senate Bill No. 1393. The People concede a limited remand for this purpose is appropriate.

On September 30, 2018, the Governor signed Senate Bill No. 1393 which, effective January 1, 2019, amends sections 667, subdivision (a) and 1385, subdivision (b) to allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1-2.) Under the pre-2019 versions of these statutes, the court was required to impose a five-year consecutive term for “any person convicted of a serious felony who previously has been convicted of a serious felony” (§ 667, subd. (a)), and the court had no discretion “to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.” (§ 1385, subd. (b).)

The statutory changes of Senate Bill No. 1393 apply retroactively to any case that is not final on January 1, 2019, under the rule of *In re Estrada* (1965) 63 Cal.2d 740. “The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.” (*People v. Conley* (2016) 63 Cal.4th 646, 657.)

The same inference of retroactivity applies when an amendment ameliorates the possible punishment. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 308.) When a statutory amendment “ ‘vests in the trial court discretion to impose either the same penalty as under the former law or a lesser penalty,’ ” there is “an inference that the Legislature intended retroactive application ‘because the Legislature has determined that the former penalty provisions may have been too severe in some cases and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances.’ ” (*Ibid.*, quoting *People v. Francis* (1969) 71 Cal.2d 66, 76.)

Under the *Estrada* rule, as applied in *Francis* and *Lara*, we infer as a matter of statutory construction, that the Legislature intended Senate Bill No. 1393 to apply to all cases not yet final on January 1, 2019. (*People v. Garcia* (2018) 28 Cal.App.5th 961,

973.) Accordingly, we remand the matter to the trial court for the limited purpose of the exercise of discretion to strike the five-year enhancement.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court for the limited purpose of the exercise of discretion whether to strike the five-year enhancement of section 667, subdivision (a).

/s/
Duarte, J.

We concur:

/s/
Murray, Acting P. J.

/s/
Hoch, J.